



Turning back the clock – Leases and the Duties Amendment Act 2009

The Duties Amendment Act 2009 received royal assent on 7 July 2009 enacting various changes to the application of duty in Victoria. One of those changes is to impose duty in relation to some leasing arrangements as an anti-avoidance mechanism to stem the use of long term lease arrangements as a way to avoid the payment of duty on the transfer of land.

Lease arrangements caught under the new provisions will be charged duty at an ad valorem rate of up to 5.5% on the dutiable value of the land to which the lease relates.

The changes will have retrospective effect from 21 November 2008.

The Act was aimed at lease arrangements which effectively transferred ownership of land to a tenant who paid a substantial premium for a long term lease and a 'peppercorn' rental. However the application of the amending provisions may be far wider.

Under new section 7, duty will be imposed on grants of lease for which "any consideration other than rent reserved is paid or agreed to be paid" in relation to either lease or a variety of land transactions including:

1. A right to purchase land or a right to transfer land;
2. An option to purchase or an option to transfer land;
3. A right of first refusal in respect of the sale or transfer of land;
4. Any other lease, licence, contract, scheme or arrangement by which the lessee (or an associate) obtains any right or interest in the land that is the subject of the lease other than the leasehold interest;

A transfer or assignment of lease for which consideration is paid in relation to these transactions will also attract duty.

A surrender of a lease falling within the new provision will also attract stamp duty (section 4(1)(ii)).

Just how many lease arrangements will be caught by these new provisions will depend on the definition of "rent reserved". Section 3 of the Act defines rent reserved to mean "the rent paid or payable during the term of the lease and any amount paid or payable for the right to use the land under the lease". Although wide, the definition also gives examples of items that would fall within the definition of rent reserved, being:

- Rates;
- Charges;
- Taxes;
- Maintenance;
- Utilities;
- Legal costs in relation to the grant of the lease;
- Insurance premiums;
- Marketing costs; and
- Car park contributions.

These items cover many outgoings contained in standard lease arrangements. However there is no mention of how other costs such as fit out, management fees or make good expenses are treated under the new provisions.

Similarly, it is arguable that the new provisions could be literally interpreted as imposing ad valorem duty upon assignment of a commercial lease as part of the sale of business as a going concern where value would be inherently attached to the contractual right of the purchaser to receive an assignment of lease upon settlement.

Regrettably the drafting of the amending legislation is far from satisfactory.

Should you require further information about the Leases and Duties Amendment Act 2009, please contact:

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